

**Elavon, Inc. v Bright Kids NYC, Inc.**

2020 NY Slip Op 31910(U)

June 18, 2020

Supreme Court, New York County

Docket Number: 450331/2017

Judge: Kathryn E. Freed

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certain credit and debit card processing services to [Bright Kids] at the agreed price and reasonable value of \$58,566.51 and although duly demanded, no part ha[d] been paid by [said d]efendant" (Doc. 7). Elavon claimed in its second cause of action that, "[a]t various times, statements of account were sent to [Bright Kids]," that "they were retained by [Bright Kids] without objection" and that "[s]uch statements of account were just and true statements of account due and owing by [Bright Kids] to [Elavon]" (Doc. 7). In its third cause of action, Elavon asserted a claim against Doruk for breach of a personal guaranty which, it alleged, rendered Doruk liable for the payment of monies owed by Bright Kids to Elavon pursuant to their agreement (Doc. 7).

On November 29, 2016, Bright Kids was served with process via the Secretary of State (Doc. 2 at 7). As reflected by a "sheriff's certificate of service," a copy of the summons and complaint was delivered to a person of suitable age and discretion at Doruk's place of employment on December 22, 2016, and additional copies were mailed to the same address that day (Doc. 2 at 3). In February 2017, defendants filed an answer, raising several affirmative defenses (Doc. 13). This action was ultimately transferred, by stipulation of the parties, from Monroe County to New York County (Doc. 8).

On November 20, 2019, Elavon filed the instant motion seeking summary judgment on liability and dismissal of defendants' answer (Doc. 2-9). Although the motion was initially unopposed, Elavon stipulated to accept defendants' late opposition papers on May 20, 2020 (Doc. 15).

In support of its motion, Elavon relies predominantly on the affidavit of Holly Franklin ("Franklin"), its senior director and the custodian of its records (Doc. 4 ¶ 1, 4). Attached to her affidavit, Franklin submits, *inter alia*, a signed copy of the credit card processing agreement and personal guaranty that was purportedly entered into by Elavon and defendants (Doc. 5). Franklin

asserts, in pertinent part, that, pursuant to the credit card processing agreement, Elavon processed the credit card and debit card transactions for Bright Kids' customers (Doc. 4 ¶ 10, 12). "[Elavon] obtained funds from the credit card and deb[it] card issuing bank and deposited such funds into [Bright Kids'] account" (Doc. 4 ¶ 12). However, Franklin affirms that, under the terms of said agreement, Bright Kids was "solely responsible for [chargebacks] and reimbursing [Elavon] in such instances" (Doc. 4 ¶ 13).<sup>1</sup> Several chargebacks, claims Franklin, were withdrawn from Bright Kids' account in 2017 in the amount of \$58,566.51 (Doc. 4 ¶ 14). Franklin further maintains that, since Bright Kids had insufficient funds in its account, Elavon was unable to be reimbursed for the chargebacks, resulting in damages in the amount of \$58,566.51 (Doc. 4 ¶ 15). She asserts that "statements of account were sent to [d]efendants outlining the [chargebacks]," that these were received and retained without objection, and that, despite repeated requests, defendants have failed to make the necessary payments (Doc. 4 ¶ 21-23).

In opposition to Elavon's motion, defendants contend, *inter alia*, that Elavon cannot make a prima facie showing of its entitlement to summary judgment on its breach of contract claim because it fails to point to any contractual provision that was breached and that this is likely due to the fact that the agreement submitted in support of its motion is illegible (Doc. 16 ¶ 13-21). Defendants maintain that the branch of the motion seeking summary judgment on the account stated claim must also be denied because Elavon has failed to furnish, *inter alia*, proof of statements of account that were retained without objection; has failed to make a showing that the alleged statements of account were forwarded to Bright Kids or retained by it without objection for a reasonable amount of time; and has failed to submit proof that Bright Kids agreed to pay a

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<sup>1</sup> Elavon fails to explain what is a "chargeback." However, it appears that chargebacks are disputed charges that were reversed to a consumer's bank account, line of credit or credit card.

portion of the debt (Doc. 16 ¶ 22-32). Defendants further assert that the claim based on the personal guaranty is barred by the statute of frauds because, *inter alia*, in the personal guaranty, at least in its legible form, Doruk's signature is on a page separate from the guaranty provision and, additionally, nowhere in the document is Doruk referred to as the personal guarantor so as to establish that he agreed to guarantee the obligations of Bright Kids (Doc. 16 ¶ 33-40).

### **LEGAL CONCLUSIONS:**

A movant is entitled to summary judgment when he or she "makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010]; *quoting Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Once the proponent has made such a showing, the burden shifts to the opposing party "to present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metro. Museum of Art*, 27 AD3d 277, 228 [1st Dept 2006]).

#### ***Breach of Contract***

"To establish a breach of contract claim, plaintiff must prove the existence of an agreement, his own performance under the agreement, breach by the defendants, and damages" (*Kosovsky v Park S. Tenants Corp.*, 2014 Slip Op 31077[U], 2014 NY Misc LEXIS 1950, \*13 [Sup Ct, NY County 2013] [Freed, J.]; *see Morpheus Capital Advisors LLC v UBS AG*, 105 AD3d 145, 150 [1st Dept 2013]).

Here, Elavon has failed to establish its entitlement to summary judgment on this claim. Although Elavon's notice of motion reflects that it is seeking summary judgment on all three causes

of action, it fails to identify any specific provision in the purported agreement which was allegedly breached (Doc. 4 ¶ 10, 13). Rather, Franklin asserts, in conclusory fashion, that "[Bright Kids] has breached [its] agreement with [Elavon] by failing to pay for the [chargebacks]" (Doc. 4 ¶ 27). Moreover, the copy of the signed agreement attached to Franklin's affidavit, and which she herself affirms is the "basis of this lawsuit" (Doc. 4 ¶ 5), is largely illegible (Doc. 5).<sup>2</sup>

### *Account Stated*

"An account stated has long been defined as an account balanced and rendered with an assent to the balance express or implied; so that the demand is essentially the same as if a promissory note had been given for the balance" (*Morrison Cohen Singer & Weinstein, LLP v Ackerman*, 280 AD2d 355, 355 [1st Dept 2001] [internal quotation marks and citations omitted]; accord *SC Intl. Inc. v Coleman Research Group, Inc.*, 2020 NY Slip Op 30271[U], 2020 NY Misc LEXIS 510, \*7-8 [Sup Ct, NY County 2020]). "To establish [a] prima facie claim of account stated, the movant is required to demonstrate that it 'generated detailed monthly invoices and mailed them to the defendant on a regular basis in the course of its business'" (*Menaker & Herrman, LLP v Foster*, 2017 NY Slip Op 31456[U], 2017 NY Misc LEXIS 2614, \*9-10 [Sup Ct, NY County 2017], quoting *Stephanie R. Cooper, P.C. v Robert*, 78 AD3d 572, 573 [1st Dept 2010]; see *Rose & Rose v Croman*, 2015 NY Slip Op 32209[U], 2015 NY Misc LEXIS 4229, \*5 [Sup Ct, NY County 2015]; *Spectrum Source Corp. v Milano Diamond Gallery, LLC*, 2015 NY Misc LEXIS 2035, \*15 [Sup Ct, NY County 2015]). Moreover, the movant must establish that the defendant retained the invoices or made a partial payment without objection for a reasonable

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<sup>2</sup> The Court contacted plaintiff's counsel in an attempt to obtain a legible copy of the agreement. However, although plaintiff's counsel furnished what he referred to as a "test copy," he did not produce a legible version of the signed document.

period of time (*see Zanani v Schwimmer*, 50 AD3d 445, 446 [1st Dept 2008]; *Morrison Cohen Singer & Weinstein, LLP v Waters*, 13 AD3d 51, 52 [1st Dept 2004]).

Elavon has failed to establish its entitlement to summary judgment on its account stated claim. First, Elavon fails to provide any specific provision in the agreement requiring Bright Kids to pay for chargebacks. Even assuming, *arguendo*, that such an obligation existed, its motion papers fail to demonstrate the absence of any material issues of fact. Although Franklin asserts that Bright Kids was sent "invoices" that it retained without objection (Doc. 4 ¶ 22), she relies almost exclusively on documents called "Merchant Chargeback Advise" which did not demand payment of any kind for the money allegedly owed, but merely notified Bright Kids of transactions debiting its account (Docs. 4 ¶ 21; 9). Additionally, the "Merchant Chargeback Advise" provided that "[Bright Kids] may be able to recover these funds by supplying information, such as the method and date a valid authorization was obtained or evidence credit was issued" (Doc. 9).

Franklin further asserts that "[d]uring the year of 2017, [d]efendants had [a] number of [chargebacks] withdrawn from its account in the amount of \$58,566.51" (emphasis added) (Doc. 4 ¶ 14). However, she references a merchant billing statement dated April 30, 2016 which only includes chargebacks from 2016 (Doc. 6). Further, the amount that is allegedly owed appears to conflict with the merchant billing statement, which reflects in the sections entitled "summary" and "chargebacks" that there were 22 chargebacks totaling \$57,874.04 (Docs. 6). Franklin also submits a chart itemizing all the chargeback amounts ("the itemized document") (Doc. 9). Without any explanation as to its significance in either the affidavit or the document itself, the itemized document indicates "total assigned: \$60,474.03"; "total payment: (blank)"; "total outstanding: \$58,566.51"; and "total counts: 24" (Doc. 9). However, the itemized chart reflects 22 chargebacks amounting to \$57,874.04, not including a \$2,579.99 processing fee and a \$20.00 insufficient funds

fee (Doc. 9). Thus, this Court is unable to ascertain from this document how Elavon reached the total of \$58,566.51 it now claims it is owed. Since "[a]n essential element of an account stated is an agreement regarding the amount of the balance due" (*Sisters of Charity Hosp. of Buffalo v Riley*, 231 AD2d 272, 282 [4th Dept 1996]), the drastic remedy of summary judgment in this instance would be improper (*see FIA Card Services, N.A. v Ashkinazy*, 48 Misc 3d 129 [A], 2015 NY Misc LEXIS 2261, \*1 [Sup Ct, App Term 1st Dept]; *First Data Merchant Serv. Corp. v Olympia York Builders and Developers, Inc.*, 14 Misc 3d 1228[A], 2007 NY Misc LEXIS 290, \*3-4 [Sup Ct, Kings County 2007]; *Thirty-One Co v Forino*, 2005 NY Slip Op 30363[U], 2005 NY Misc LEXIS 8516, \*9 [Sup Ct, NY County 2005]).

### ***Personal Guaranty***

For the reasons previously articulated, Elavon also fails to establish its prima facie entitlement to summary judgment on its claim for breach of the personal guaranty. To establish such a claim, a plaintiff must produce a valid guaranty, the underlying debt, and the guarantor's failure to meet its payment obligations (*see Pitsy, LLC v Rindenow*, 165 AD3d 1300, 1301 [2d Dept 2018]; *Thor Gallery At S. Dekalb, LLC v Reliance Mediaworks [USA] Inc.*, 143 AD3d 498, 498 [1st Dept 2016]; *Reliance Const. Ltd. v Kennelly*, 70 AD3d 418, 419 [1st Dept 2010]). Since the underlying debt is unclear, and the section entitled "personal guaranty" was not signed by Doruk, that branch of the motion seeking summary judgment on this claim is hereby denied.

Since no substantive arguments are raised by Elavon with respect to that branch of the motion seeking to strike defendants' answer, it is denied.

The remaining arguments are either without merit or need not be addressed given the findings above.

Based on the foregoing, it is hereby:

**ORDERED** that plaintiff Elavon Inc.'s motion, pursuant to CPLR 3212, seeking summary judgment on liability and dismissal of defendants' answer is denied; and it is further

**ORDERED** that counsel for defendants Bright Kids NYC, Inc. and Bige Doruk shall serve a copy of this order, with notice of entry, upon plaintiff Elavon Inc. within 30 days of entry; and it is further

**ORDERED** that the parties are to appear for a preliminary conference on November 10, 2020 at 80 Centre Street, New York, NY, Room 280, at 2:15 p.m.; and it is further

**ORDERED** that this constitutes the decision and order of this Court.

6/18/2020  
DATE

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KATHRYN E. FREED, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: